

**UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Charged Party; and

NERONE & SONS, INC.
R.G. SMITH COMPANY, INC.

Case No. 08-CD-135243
Case No. 08-CD-143412

Charging Parties; and

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 310

Party-in-Interest

LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 310

Charged Party; and

NERONE & SONS, INC.
R.G. SMITH COMPANY, INC.

Case No. 08-CD-135244
Case No. 08-CD-143415

Charging Party; and

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Party-in-Interest

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S REQUEST
FOR SPECIAL PERMISSION TO APPEAL FROM THE REGIONAL DIRECTOR'S
RULING**

Now comes Charged Party, International Union of Operating Engineers, Local 18 (“Local 18” or “Union”), by and through counsel, and respectfully requests special permission to appeal from the Regional Director’s Ruling refusing to grant Local 18’s Motion for Postponement of the 10(k) hearing in the present matter. A Brief in Support of this Motion is attached hereto and incorporated herein by reference.

Respectfully Submitted,

/s/ Timothy R. Fadel

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BRIEF IN SUPPORT

I. Introduction & Background

Pursuant to Section 102.26 of the Board's Rules and Regulations and Section 10290.4 of the Board's Casehandling Manual, prehearing rulings by the Regional Director may be appealed directly to the National Labor Relations Board ("Board") by way of a Request for Special Permission to Appeal.

On August 22, 2014, Charging Party Nerone & Sons, Inc. ("Nerone") filed two ULP charges with Region 8 of the Board against Charged Parties Local 18 and the Laborers' International Union of North America, Local 310 ("LIUNA 310"), alleging that they had violated Section 8(b)(4)(D) of the National Labor Relations Act ("Act"), which resulted in Case Nos. 08-CD-135243 and 08-CD-135244, respectively. These cases were consolidated and set for hearing on January 7, 2015 ("Nerone Case"). On December 23, 2014, Charging Party R.G. Smith Company, Inc. ("R.G. Smith") filed two ULP charges with Region 8 of the Board against Charged Parties Local 18 and LIUNA 310, alleging that they had violated Section 8(b)(4)(D) of the Act, which resulted in Case Nos. 08-CD-143412 and 08-CD-143415, respectively.

On December 29, 2014, before the Regional Director, Nerone and LIUNA 310 jointly moved that the hearing in the Nerone Case be postponed indefinitely until it could be consolidated with the R.G. Smith Case. While Local 18 did not oppose this Motion for Postponement and Consolidation, it made clear that its lack of opposition did not constitute an agreement that the Nerone Case should or would be consolidated with the R.G. Smith Case, and further reserved its right to contest any determination by the Region regarding such consolidation. As expected, Region 8 readily acquiesced to the Motion for Postponement and Consolidation on January 5, 2015, but did so in a very particular manner. Rather than indefinitely

postponing the hearing until consolidation, the Region issued an Order Rescheduling Hearing for the Nerone Case *only* to February 9, 2015. Further, the Region did *not* consolidate the Nerone and R.G. Smith Cases in that Order.

On the afternoon of January 29, 2015, Local 18 was served with the Region's Order Further Consolidating Cases and Notice of Hearing. Pursuant to this Order and Notice, a hearing under Section 10(k) in the Nerone and R.G. Smith Cases was scheduled to open on February 9, 2015. While Local 18 was aware that the Nerone Case alone was scheduled to open on February 9, it had no reason to believe that it would be consolidated with the R.G. Smith Case, as the Region had – instead of indefinitely postponing the Nerone Case until consolidation with the R.G. Smith Case – simply set the Nerone Case alone for hearing in its January 5 Order. Accordingly, the Region's January 29 Order Further Consolidating Cases was the first definitive notice to Local 18 that a 10(k) hearing would be conducted in the R.G. Smith Case. As such, Local 18 received less than two weeks' advance notice of a hearing in the consolidated cases.

Moreover, in addition to consolidating the Nerone Case and R.G. Smith Case, the Region's January 29 Order Further Consolidating Cases also greatly expanded the scope of the hearing anticipated by Local 18. Indeed, prior to January 29, Local 18 was completely unaware that the Region was preparing for a hearing addressing “[w]hether an area-wide award is appropriate, and if so, (1) whether it should only cover similar work done by the Employer-parties to all instant cases or whether it should cover similar work being done by all employers and (2) the geographical scope of the area-wide award.” This broad description of the hearing's scope encompasses a plethora of factual and legal issues that are relatively novel in both substance and procedure. Specifically, the Region's January 29 Order expanded the scope of the hearing to include, *inter alia*, issues related to what constitutes “similar work” and the business

practices of hundreds of unidentified construction contractors performing an unspecified type of work in an unspecified geographic region.

Given the expanded scope of the hearing, on February 2, 2015, Local 18 filed a Motion for Postponement of the 10(k) hearing scheduled for the Nerone and R.G. Smith Cases. In its Motion, Local 18 set forth good cause for granting the request. Specifically, Local 18 advised the Regional Director that the belated Notice of Hearing issued on January 29 effectively provided Local 18 with less than seven (7) business days to prepare for the hearing. Local 18's request also pointed out that the difficulties caused to the Union by the minimal amount of time provided to prepare for the hearing was further compounded by the greatly expanded scope of the Hearing as contained within the Region's January 29 Order. In addition, Local 18's Motion for Postponement indicated that all parties were unopposed to such a postponement. Due to the fact that representatives from the Charging Parties were out of the country, the parties were unable to agree upon a firm date to reschedule the hearing. Nevertheless, all parties indicated that a hearing date in March of 2015 was more than likely.

On February 4, 2015, the Region had yet to rule on Local 18's Motion. Accordingly, in an attempt to prepare for the hearing, on February 4, 2015, Local 18 filed a request for Two-Hundred and Fifty (250) Subpoenas *ad testificandum* and *duces tecum* each, for a total of Five Hundred (500) subpoenas. While voluminous, this request was necessitated by the multitude of non-party employers that might potentially be implicated in the scope of the hearing as set by Region 8.

On February 5, 2014, the Regional Director denied Local 18's Motion for Postponement stating that "there has been a lack of good cause shown to substantiate the motion." Similarly, on February 5 the Region advised Local 18 that it was refusing to issue subpoenas as requested.

Specifically, the Region informed Local 18 that it would only be permitted to receive Ten (10) subpoenas *ad testificandum* and *duces tecum* each. No reason for this refusal was provided.

II. Argument

Region 8's denial of Local 18's February 2 Motion for Postponement is entirely unjustified given the circumstances of the present matter. In order to be afforded any meaningful semblance of due process, Local 18 will need sufficient time to determine not only the legal and procedural issues encompassed within the greatly expanded scope of the consolidated Nerone and R.G. Smith 10(k) hearing, but also relevant factual and evidentiary issues. Such issues include what constitutes "similar work" and what constitutes "all employers." Similarly, in order to properly contend with the Region's novel decision to specifically request evidence concerning the propriety of an area-wide award involving a legion of employers who are not parties to this case, Local 18 will need to issue hundreds of subpoenas and review thousands of pages of documents. Presently, the Region has refused to provide the subpoenas necessary to procure this evidence and has not afforded Local 18 with a reasonable amount of time to issue the subpoenas. Despite being made aware of these issues, the Region remains obstinate in its refusal to postpone the hearing.

Moreover, through Local 18's Request for Postponement, the Region was made well-aware that counsel for Local 18 is involved in a plethora of other active litigation with impending February 2015 deadlines. Specifically, the Region was advised of the following pending matters: a post-hearing brief to be filed following an 11-day ULP hearing in *Operating Engineers Local 18 (Donley's)*, 08-CD-081840; an appellate brief to be filed with the Sixth Circuit Court of Appeals in *International Union of Operating Engineers, Local 18 v. Ohio Contractors Association*, Case No. 14-4294; a motion for judgment on the pleadings to be filed with the

United States District Court, Northern District of Ohio in *International Union of Operating Engineers, Local 18 v. Ohio Contractors Association*, Case No. 1:14-cv-1673; and dispositive motions to be filed with the United States District Court, Northern District of Ohio in *International Union of Operating Engineers v. Laborers' International Union of North America, et al.*, Case No. 1:12-cv-02797.

The Regional Director has been made well-aware of the above-described concerns regarding the sudden consolidation of the Nerone and R.G. Smith Cases, yet it chose to go forward with essentially a hearing by ambush. While all parties knew that consolidation of the cases could become an issue at some point due to Nerone and LIUNA 310's December 29, 2014 Joint Motion for Postponement and Consolidation, the Region made tacitly clear that its February 9, 2015 hearing date did not, in any way, shape, or form, reflect a potential consolidated hearing date for both cases. Rather, it rejected indefinite postponement and consolidation for a date certain regarding the Nerone Case *only*.

Local 18 does not seek an undue delay in the consolidated hearings that would prejudice the interests of the parties. Indeed, all parties are unopposed to a reasonable and understandable extension of time for the hearing to open in March of 2015. The Regional Director has afforded this basic courtesy to Nerone and LIUNA 310 when it rescheduled the Nerone Case for February 9, 2015, yet has failed to extend this same courtesy to Local 18. Given the attendant circumstances of the present case, there is no good reason for the Regional Director to deny the same to Local 18. Accordingly, Local 18 respectfully requests that the Board accept Local 18's Special Permission to Appeal and reverse the Regional Director's February 5 Denial of Local 18's Motion for Postponement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with National Labor Relations Board, Office of the Executive Secretary, and served by email to the following on this 5th day of February 2015:

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